

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF MASSACHUSETTS (Boston)

3 No. 1:20-cv-11104-WGY

4
5 VICTIM RIGHTS LAW CENTER, et al,
6 Plaintiffs

7 vs.

8
9 ELIZABETH D. DeVOS, in her official capacity as Secretary
10 of Education, et al,
11 Defendants

12 *****

13
14 For Zoom Hearing Before:
15 Judge William G. Young

16 Preliminary Injunction

17 United States District Court
18 District of Massachusetts (Boston)
19 One Courthouse Way
20 Boston, Massachusetts 02210
21 Wednesday, September 2, 2020

22 *****

23 REPORTER: RICHARD H. ROMANOW, RPR
24 Official Court Reporter
25 United States District Court
One Courthouse Way, Room 5510, Boston, MA 02210
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1 P R O C E E D I N G S

2 (Begins, 3:00 p.m.)

3 THE CLERK: Now hearing Civil Matter 20-11104,
4 Victim Rights Law Center vs. DeVos.

5 THE COURT: Good afternoon, counsel, thank you for
6 attending on this session of the court. This is a
7 hearing conducted via zoom and in this pandemic time
8 such hearings are authorized by statute, regulation, and
9 the local rules of this court. It's presided -- or our
10 host at the hearing is Courtroom Deputy Clerk, Jennifer
11 Gaudet, I have on the line our Official Court Reporter,
12 Rich Romanow, and law clerks. This is a public hearing
13 of the court and the press and the public are welcome.
14 I have no idea whether anyone else is on the line, but
15 on the theory that they may be, let me say that you must
16 keep your mics muted and that the rules of court remain
17 in full force and effect and that means there will be no
18 rebroadcast, taping, streaming, or other transmission of
19 this hearing.

20 It's also appropriate, before I have counsel who
21 will argue introduce themselves, to acknowledge with
22 gratitude the briefs filed by the various amici, all of
23 which the Court has considered, and I appreciate them.

24 Now would counsel introduce themselves starting
25 with the plaintiffs.

1 MR. NEWMAN: Your Honor, David Newman from
2 Morrison & Foerster on behalf of the plaintiff. My
3 co-counsel, Ms. Fleming-Nolan, is here on the screen and
4 will also be presenting argument as well, as will my
5 Co-counsel, Ms. Shiwali G. Patel.

6 THE COURT: Well we'll see. But thank you.
7 And for the Secretary?

8 MS. DICKEY: Ms. Jennifer Dickey, your Honor.

9 THE COURT: Good afternoon, Ms. Dickey.

10 MS. DICKEY: Good afternoon, your Honor.

11 THE COURT: Anyone else?

12 (Silence.)

13 THE COURT: Well the reason -- I don't mean to be
14 brusque in any way and I want you to know that while I
15 compliment the amici, so do I thank the parties for
16 their careful consideration of these issues, which are
17 important issues. Having said that, the place I want to
18 start here, and it's a question for the plaintiffs, is
19 it would seem that the college plaintiffs, the
20 individual college plaintiffs don't have standing, and
21 that's because it appears, without dispute, that the two
22 colleges involved, um, are going to enforce these
23 regulations prospectively and are not going to enforce
24 them retroactively. Now whatever may be the case of the
25 college plaintiffs, um, it would appear that these

1 regulations don't bear on their cases and for that
2 reason I ought dismiss the college plaintiffs. And I'm
3 not clear on the secondary school plaintiffs and we'll
4 ask about that.

5 But isn't that true? And I'll ask plaintiffs'
6 counsel.

7 MS. FLEMING-NOLEN: Your Honor, this is Natalie
8 Fleming-Nolen from Morrison & Foerster, and, um, we do
9 not think that is true, your Honor. There are more than
10 two colleges involved here, we have the UC Santa
11 Barbara, we have Harvard, um, as well as UNH. And so
12 there are, um, multiple colleges involved. And the
13 colleges --

14 THE COURT: Wait. Wait. Wait. Wait. Wait just
15 a minute. You're telling me that the named plaintiffs
16 -- and I have no problem with pseudonyms here, but
17 you're telling me that the named plaintiffs include
18 someone from UNH?

19 MS. FLEMING-NOLEN: Yes, your Honor.

20 THE COURT: The named plaintiffs?

21 MS. FLEMING-NOLEN: Yes, your Honor.

22 THE COURT: All right. All right. And so let's
23 limit ourselves to the colleges you first recited.
24 Shouldn't I dismiss those two, the people in those
25 colleges?

1 MS. FLEMING-NOLEN: As meaning UC Santa Barbara
2 and Harvard, your Honor?

3 THE COURT: Yes, because from those -- from those
4 two we know that they're going to go on a two-track
5 system.

6 MS. FLEMING-NOLEN: Your Honor, I think that there
7 is still a lack of clarity for the UC system as to how
8 they're going to resolve, um, our clients' claims. And,
9 your Honor, I think that, um, additionally that the
10 clients have lost something tangible, they've lost the
11 ability of the federal government to say their schools
12 must proceed in a certain way, but their schools are
13 deliberately indifferent against the claims. They have
14 no remedy from the Office of Civil Rights because the
15 final rule has said the claims --

16 THE COURT: Just a moment. Just a moment. That
17 would be true -- I mean you're making a claim against
18 the, um, guidance from the Department of Education long
19 before these regulations came into effect? I didn't
20 read your complaint that broadly. I read that it was
21 addressed to these regulations, the ones that came into
22 effect on the 14th of August.

23 MS. FLEMING-NOLEN: Yes, your Honor, that's true.
24 Under previous guidance, claims from our individual
25 plaintiffs would have been required -- the group would

1 have been required to take actions in the same line.
2 But under the final rule, if they don't fall within the
3 definition of "sexual harassment," either because they
4 filed claims after they graduated or because of the
5 location of the assault, then they are at the mercy of
6 what their schools decide to do and they have lost the
7 ability to go to the Office of Civil Rights and say that
8 their school had treated them unfairly and that they
9 suffered a civil rights violation. So their rights
10 under the federal law have been narrowed by the final
11 rule.

12 THE COURT: With all respect, I find that very
13 difficult to, um, comprehend and the plaintiffs from
14 USC, Santa Barbara, and Harvard are dismissed, without
15 prejudice. You have 30 days from today's date to file a
16 motion for leave to file an amended complaint as to
17 those plaintiffs specifically setting forth the basis
18 and pleading with some specificity what you have tried
19 to articulate that they have lost.

20 Now let's turn to the motion for preliminary
21 injunction. I'm disposed to consolidate that motion
22 with trial on the merits and give you a prompt trial,
23 and by "prompt trial," I mean a trial within days, and
24 I'm going to ask you how long you want to prepare for
25 such a trial.

1 And in making that -- in answering that question,
2 um, I'm not saying this covers the whole universe of
3 questions, but I have various factual questions, and I
4 will pose them, and you can -- you can either answer now
5 or you can, um, take some time and then answer in an
6 evidentiary sense. But please listen to my questions
7 because I think these questions bear on the ultimate
8 result here.

9 Now I do want to know, and counsel quite properly
10 raised it, that if I have missed the plaintiff from UNH,
11 as to that plaintiff and the ones from the secondary
12 schools, I want to know whether any of those
13 institutions, um, intend to apply these new regulations,
14 um, that went into effect on August 14th? I want to
15 know if they intend to apply them retroactively? And it
16 seems to me that's a matter capable of ascertainment.

17 On the same score I want to know whether, um, with
18 respect to any of those institutions or others, the
19 Department is taking a position, communicating to the
20 institutions that these rules must be or should be or,
21 um, suggest that there's guidance that they be applied
22 retroactive.

23 Also, I want to know -- though the rules on their
24 face say that they are prospective, I want to know under
25 what guidelines the Department -- and this is a question

1 for the government here and I expect the government to
2 answer. Under what guidelines does the government
3 intend to enforce Title IX with respect to conduct
4 occurring before August 14th? And here's why I ask.

5 Is the 2001 guidance still operative? There's a
6 blog post from the Department that suggests that only
7 regulations issued prior to August 14th carry weight.
8 Now this may be an issue to which plaintiffs' counsel
9 once averted, and if so, that's a serious matter. I
10 want to know the government's position on that.

11 Also, moving on, um, and I'm talking now about the
12 organizational plaintiffs. This is very thin, um, and I
13 say this with respect, to how the missions of the
14 organizational plaintiffs are -- and after August 14th
15 are -- how are they being frustrated, and is it possible
16 to tie that frustration to particular provisions of the
17 rule? It's not enough just to object to the rule. I
18 have little doubt that organizational plaintiffs, at
19 least at first blush, may have standing. But unless
20 their organizational goals are being frustrated as
21 organizations, that there's a real question about their
22 standing.

23 Now some specific questions for the government,
24 and it goes to specific provisions of these new rules.
25 The -- did the Department, in developing these new

1 regulations, is there any evidence -- did the Department
2 ever consider making this blanket exclusion of the rules
3 against hearsay, with their exceptions, discretionary to
4 schools? What consideration was given to that? And
5 I'm -- I must say, or rather I'm going to question when
6 we get to substantive argument, um, that I don't
7 understand how, um, permitting reliable and probative
8 evidence that's received in every administrative agency
9 of the federal government and the federal courts
10 throughout the land by force of law and which in
11 criminal cases, um, passes muster under the
12 confrontation clause is now to be swept aside. I
13 just -- I'm going to have to hear the argument on that.

14 And then with respect to this unaffiliated
15 complainant exclusion, um, I want to know how the
16 Department or if the Department considered deterrence?
17 You know if someone is withdrawn because of sexual
18 harassment, or one can think of a myriad of situations,
19 and then they are -- they are unaffiliated complainants,
20 um, I'm not so clear as to why, when this guidance says
21 "Now don't get into those matters," how that advances
22 the beneficent goal of deterrence against sexual
23 harassment?

24 Now I'm sure I'll have other questions, but these
25 are the questions that, as I prepared for this, I'm

1 going to be asking. And, um, I just think it's
2 counterproductive to hold a hearing on a preliminary
3 injunction and go all through that when there isn't much
4 additional evidence we're going to need here, um, that I
5 can see. We need to know the position of the various
6 schools at issue as to the individual plaintiffs, but
7 the rest of it all, um, is either known now or, um,
8 capable of ready ascertainment, and there's a record
9 here.

10 So I don't see, from the materials before me, um,
11 answers to those questions, and that's why, under
12 Federal Rule of Civil Procedure 65(a), I want to go to
13 trial on the merits, but trial on the merits within days
14 or longer, if the parties agree.

15 So we'll start with the plaintiffs. When do you
16 want a trial in this case?

17 (Silence.)

18 THE COURT: The plaintiffs?

19 (Silence.)

20 MS. FLEMING-NOLEN: Yes, your Honor -- and this is
21 Ms. Fleming-Nolen, and we are -- we are kind of
22 consulting a little bit at the moment with our
23 co-counsel so we don't have a --

24 THE COURT: Sure, well that's fine, let's go to
25 the -- let's go to the Secretary in the Department.

1 How about the Department?

2 MS. DICKEY: Your Honor, we would ask for 45 to 60
3 days to prepare, but of course, um, we're happy to
4 consult with plaintiffs' counsel.

5 THE COURT: I don't understand, why do you need
6 that time? The advantages of a prompt trial seem to,
7 um, aid both parties equally because if you get a prompt
8 trial, you get a judgment, and the judgment is whatever
9 it is, I support it with any reasonings, and then you
10 can go to a court higher than me. And I -- I'm not --
11 there's no false modesty there or is there any pride of
12 place, but these are not insignificant issues, this is
13 litigation that's pending in a number of different
14 courts, the government appears to be well-prepared here.
15 I just don't see the need for some sort of argument that
16 doesn't lead us anywhere, just takes us to some
17 preliminary determinations and more questions and the
18 like, that's going to drag the thing out. Why do you
19 need so long?

20 MS. DICKEY: Your Honor, if what you're
21 envisioning is, um -- I'm sharing your point, but on the
22 merits I propose to having to present witnesses for whom
23 we would do depositions in advance. But because this is
24 an APA matter, we can proceed quickly for a hearing just
25 on the administrative record, if that is what the Court

1 prefers.

2 THE COURT: Well it's not a question of my
3 preference because you get all the rights that you have
4 under the law, so put my preference to one side, but you
5 do understand perfectly what I contemplate and that's
6 why I -- that's what I asked you, and I'll ask the
7 plaintiffs. I mean what evidence am I going to have to
8 take here? I've tried to flag for you questions that I
9 have. But some of those questions are answered, um,
10 from the administrative record or lacune in the
11 administrative record. The only real evidence that we
12 need to track down is the position as to the individual
13 plaintiffs of the particular schools, are they going to
14 do a two-track and -- and I do want an answer on, um --
15 because it is unclear, I want the Department's position
16 on the questions I've asked. If this is, um -- and I
17 don't suggest it is in any way, but if there's some sort
18 of retroactive slight-of-hand, I am thinking of a
19 proceeding that is sufficient to uncover it. But other
20 than that, you know, I'm fine, we could start Monday if
21 we can get answers.

22 So with that in mind, you don't need 45 or 60
23 days?

24 MS. DICKEY: No, your Honor, we could proceed much
25 faster.

1 THE COURT: Sure. I'm sure you can.

2 Okay, now let's go back to the plaintiffs. Have
3 you had enough time to consult?

4 MR. NEWMAN: Yes, your Honor. In light of your
5 Honor's remark, we envision 30 days being an appropriate
6 time period, if your Honor is amenable, in part because
7 that would permit us to get a better factual
8 understanding of what is actually occurring at the
9 school given the recency of the start of the school.

10 THE COURT: 30 days makes sense to me. Having
11 said that -- and I'm not trying to constrain everyone,
12 and when I spoke to the government attorney, I meant
13 that in all sincerity. You have all the rights that are
14 afforded you under the law and under the rules of
15 procedure. But I contemplate a focused hearing. That
16 should be enough time to find out definitely with
17 respect to the named -- the pseudonymously-named
18 plaintiffs and the schools that I've left in, how they
19 intend to proceed. Without the necessity of formal
20 discovery, I should think you'd be able to stipulate to
21 that. And likewise I cast the Department with giving me
22 some answers as to what its intentions are. And against
23 that background, it seems to me we're able to, um --
24 we're able to proceed.

25 Now if by -- if suddenly we're looking at vast

1 case management orders and the like, um, I've made a
2 mistake and I'll have to think again. But 30 days makes
3 sense. Let's ask the government.

4 Is 30 days sufficient?

5 MS. DICKEY: That's sufficient for us.

6 THE COURT: All right.

7 Have I engendered any questions you want to ask me
8 before I have the Clerk set the matter down for trial
9 with a specific date? And I'll start, as I should, with
10 the plaintiffs. Any questions?

11 MR. NEWMAN: Your Honor, in respect to the
12 administrative record, I think given the 30-day trial
13 date, we would respectfully request that the government
14 provide that to us on a short time frame as they're
15 able. We understand that in other challenges
16 proceedings with respect to the same rule, they may be
17 providing a record as early as into next week and we --

18 THE COURT: That makes perfect sense and I expect
19 their cooperation and I expect the record to be produced
20 as rapidly as possible.

21 Any other questions?

22 (Silence.)

23 THE COURT: And for the government, any questions?

24 MS. DICKEY: No, your Honor.

25 THE COURT: Well I thank you. I -- I don't mean

1 this to be anticlimactic, but I -- these are not
2 insignificant matters and I really think all parties
3 will be benefitted by a prompt trial.

4 Now we'll turn to the Courtroom Deputy Clerk for
5 whom I, in a very literal sense, I work, and she will
6 suggest a date for the trial.

7 Now if you could stipulate to all the facts, um,
8 we can set it down for the afternoon. I'm going to set
9 it down for a morning on the possibility that there
10 might have to be some limited evidence. It's clearly
11 jury-waived, but candidly I don't -- I don't expect
12 that, I expect you to agree upon the factual situation.
13 And, um, since this will be final argument, each side
14 will get a half an hour, and you're entitled then to
15 full findings and rulings and it will be my duty to
16 provide it.

17 So Ms. Gaudet will suggest a morning and, um --
18 but I expect from you, if you actually think that I have
19 to take some evidence because there's some credibility
20 issue, which I think is very unlikely, then you must
21 give me notice.

22 So, Ms. Gaudet?

23 THE CLERK: Wednesday, October 14th.

24 THE COURT: Wednesday the 14th of October at
25 9:00 a.m.

1 Is that satisfactory to the plaintiffs?

2 MR. NEWMAN: I'm looking at the faces on the
3 screen as well, your Honor, but with the folks in the
4 room here at Morrison Foerster the answer is "Yes." And
5 I see now a nod on the screen, so the answer is "Yes."

6 THE COURT: And I thank you.

7 And for the government?

8 MS. DICKEY: That's fine for the government as
9 well. Thank you.

10 THE COURT: Very well. It's set down for a
11 hearing on the merits on the 14th of October at
12 9:00 a.m., the parties to give earliest notice should it
13 be believed that any evidence need be received. And I
14 do thank you very much. The work that's been done is
15 very helpful to the Court.

16 And with that I think we'll stand in recess.

17 (Ends, 3:30 p.m.)
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C E R T I F I C A T E

I, RICHARD H. ROMANOW, OFFICIAL COURT REPORTER,
do hereby certify that the foregoing record is a true
and accurate transcription of my stenographic notes
before Judge William G. Young, on Thursday, September 3,
2020, to the best of my skill and ability.

/s/ Richard H. Romanow 09-17-20

RICHARD H. ROMANOW Date